82-1194



NO._____

IN THE

# SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

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RONALD DALE DUNN PETITIONER

VS.

STATE OF TEXAS RESPONDENT

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PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS

Louis Dugas, Jr.
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## QUESTIONS PRESENTED

Can a State consistent with the Double Jeopardy Clause prosecute as two separate crimes a single transaction involving different drugs?

Whether the doctrine of collateral estoppel is applicable to a second prosecution based upon the simultaneous possession of two different drugs?

Does the Double Jeopardy Clause require that a plea of former acquittal be based on a legally sufficient indictment?

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## OPINION BELOW

The opinion in the case of Ronald Dale Dunn has not yet been published. (App. A 1a-4a). The Court of Criminal Appeals refused the petition for discretionary review. (App. B 5a).

## JURISDICTION

In the case of Ronald Dale Dunn, the Court of Appeals opinion was rendered on August 19, 1982. (App. A 1a-4a). A petition for discretionary review was refused by the Court of Criminal Appeals on November 17, 1982. (App. B 5a).

The petition for certiorari was filed within sixty (60) days of the date of the motion for rehearing in the case.

This Court's jurisdiction is invoked under 28 USC §1957 (3).

## CONSTITUTIONAL PROVISION INVOLVED

USC Constitution, Amendment 5 (Double Jeopardy Clause)

> . . .; nor shall any person be subject for the same offense to be twice put in jeopa-dy of life or limb; . . .

## STATEMENT OF THE CASE

The petition for certiorari involve the cases of a husband and wife tried for the same offense at separate trials.

On the 27th day of January, 1979, the

home of Ronald Dale Dunn and Betty Jean Lux Dunn was searched pursuant to a search warrant authorizing a search for drugs. The execution of the search warrant uncovered amphetamine and marihuana. Both Dunns were indicted by the Grand Jury of Brazoria County. There were two indictments returned against each Dunn. One indictment charged them with four counts involving amphetimine. The second indictment charged them with the offense of possession of marihuana.

On April 14, 1980, the petitioners were placed on trial for the charges involving amphetamines. Upon completion of State's case in chief, both petitioners moved for an instructed verdict of acquittal because the State had charged them with manufacturing and possessing "amphetimine" and the proof offered by the State established the control substance to be "amphetamine." The Court granted the motions for instructed verdicts of not guilty. (App. A2a-3a).

Subsequently the petitioners were each brought to trial on the indictments alleging that the offenses were one and the same and that the judgment acquitting them of the amphetamine charges was a bar to further prosecution. The plea in bar was denied by the trial judge and each petitioner proceeded to trial. Betty Jean Lux Dunn was convicted of possession of marihuana and given 10 years probated and a fine of $2,500.00. Ronald Dale Dunn was also convicted of possession of marihuana and given 10 years probated over 8 and fined $5,000.00.

Both convictions were upheld by the

Texas Court of Appeals and both petitioners were denied review by the Texas Court of Criminal Appeals.

## REASONS FOR GRANTING PETITION

A. The petitioner has been deprived of his underlying basis to lodge a claim of former acquittal under the Double Jeopardy Clause of the 5th Amendment to the United States Constitution. This has occured as a result of the appellate courts in Texas considering this case as involving the Texas doctrine of carving which has been abolished. Ex Parte McWilliams, Tex. Cr. App., 634 S.W. 2d 815 (1982). Each of the Texas Courts of Appeals considering the appeals filed by the petitioner refused to acknowledge that Article 27.05 Texas Code of Criminal Procedure controls the proper disposition of this case. This article specifically allows the defendant in a criminal case, where situation allows, to file a plea alleging that

> "he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial and that the former prosecution: (1) resulted in acquittal; . . ."

If the Court of Appeals had properly considered Art. 27.05 C.C.P. then the in bar filed by the petitioner would have barred the second prosecution on the charge of marihuana. The courts of Texas have created by inuendo two offenses in a situation such as this where the offense involves the simultaneous possession of two different drugs. In fact the courts of Texas had held on numerous occasions that the simultaneous possession of two drugs

was but one offense. Ex Parte Adams, Tex. Cr. App. 541 S W 2440 (1976). There have been no further cases in Texas overruling these cases, yet the action of the Court of Appeals effectively deprives this defendant of his right to claim Double Jeopardy.

B. The Courts of Appeals improperly applied Blockburger. The 14th Court of Appeals in affirming Ronald Dale Dunn's case applied Blockburger v. U.S. 284 U.S. 299, 52 S. Ct. 180, 76 L Ed 306 (1932) as the authority. Blockburger dealt with one act violating two statutes. Here we have one act, possession of two different drugs violating one statute. Art. 4476-15 Vernon Ann. Civil Statutes of Texas. There is a further difference Blockburger was concerned with the imposition of cumulative punishment. The case involving petitioner is dealing with the question of former acquittal and whether successive prosecutions are permissible. As the Supreme Court of the United States said Brown v. Ohio, 432 US 161, 53 L Ed 187, 97 S.Ct. 221 (1977).

> "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

Ashe v. Swenson 397 US 436, 25 L Ed 2d

469, 90 S. Ct. 1189 (1970). In fact the analogy between the Ashe case and these cases are strikingly similar. In Ashe separate convictions of the robbery of each victim would have required proof in case that a different individual had been robbed. In the instant case, separate convictions for possessiong drugs would have required proof that a different drug had been possessed. Therefore the doctrine of collateral estoppel incorporated into the Double Jeopardy Clause is applicable to this case.

C. The Double Jeopardy Clause does not require a legally sufficient indictment as a bar to a second prosecution. In Ball v. United States 163 US 662, 41 L Ed 300, 16 S. Ct. 1192 (1896), the Court held that if the court had jurisdiction of the cause and the party, a verdict of acquittal was conclusive in favor of the defendant Millard Ball even though the indictment was insufficient. The Texas case of Mixon v. State, 35 Tex. Crim. 458, 34 SW 290 (1896) hold that

> "no matter how defective the indictment was, the State could not again put him on trial for said offense of which he had been previously acquitted."

The Supreme Court having stated in Sanabria v US 437 US 45,

> "It is without constitutional significance that the Court enter a judgment of acquittal rather that directing the jury to bring a verdict of acquittal . . .

In this cause the indictment alleged the drug as being "amphetimine" and the proof showed amphetamine. Amphetimine is not a controlled substance. At the close of the State's case the defendant moved for an instructed verdict of acquittal which was granted by the court. Petitioner submits that he has been forced to run the gauntlet twice and that his plea of former acquittal should have been granted.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Texas Courts of Appeal and the Texas Court of Criminal Appeals.

Respectfully Submitted,

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APPENDIX A

T1-82-32-223

RONALD DALE DUNN, APPELLANT

A14-82-115-CR VS.

THE STATE OF TEXAS, APPELLEE

An Appeal from the 212th District Court
of Galveston County

Cause No. 36,634

This is an appeal from a conviction for possession of marihuana. Trial was to a jury, who found the appellant guilty and assessed his punishment at ten years incarceration, to be probated for a term of eight years, with a fine of five thousand dollars. Appellant asserts one ground of error and does not challenge the sufficiency of the evidence. We affirm.

In his sole ground of error appellant contends that his trial was in violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution and the Texas Constitution, Article I, Section 14. The record reflects that on January 27, 1979, a search was conducted at the home of appellant. The officers eized amphetamines and marihuana at the residence. As a result of the seizure, two indictments were returned by the Brazoria County Grand Jury. The first indictment charged the appellant, in four different paragraphs, with offenses specifically involving the substance amphetimine. The second indictment charged the appellant with the offense of possession of marihuana.

On April 15, 1980, the State tried appellant on the first indictment. Upon completion of the State's case-in-chief, defendant moved for an instructed verdict of acquittal which the court granted. The State argues that such acquittal was granted on the grounds that the indictment did not allege an offense because of the misspelling of the drug amphetamine as amphetimine. The record does not show, however, the basis on which the acquittal was granted. Whether the first indictment was void is no longer critical since the holding of Ex Parte McWilliams, 632, S.W. 2d 574 (Tex. Crim. App. 1980) as will be discussed later in the opinion.

On November 16, 1981, appellant was brought to trial on the remaining indictment, alleging that he had illegally possessed marihuana. At the second trial, the jury found appellant guilty and it is this conviction from which appellant has perfected this appeal.

Appellant contends that since he had previously been tried and acquitted for a violation arising out of the same transaction as the present case, the double jeopardy clause prevented the trial court from having jurisdiction to try him in the present case.

We would first point out that neither the United States Constitution nor the Texas Constitution prohibits multiple prosecution for two statutory offenses commited in the same transaction. The constitutional provisions speak of double jeopardy in terms of the "same offense"

rather than the "same transaction." The carving doctrine speaks in terms of the "same transaction." In Paschal v. State, 49 Tex. Crim. 111, 90 S.W. 878 (1905), the Court stated "[w]here the prosecution is upon an information, the state can carve but once for the same transaction." However, in a recent decision the Court stated "[w]e have not re-examined the doctrine of carving and have concluded that it should be abandoned." Ex Parte McWilliams, 632, S.W. 2d 574, 588 (Tex. Crim. App. 1980).

Since the carving doctrine has been abandoned, then double jeopardy only applies to a second trial based on the "same offense." The following test for determining the same offense has been provided by the Supreme Court of the United States:

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L Ed 306 (1932); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L Ed 2d 187 (1977); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L Ed 2d 715 (1980); Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L Ed 2d 228 (1980); Ex Parte McWilliams, supra at 583.

The Court in McWilliams further stated that there may be a substantial overlay in the proof of each offense; however, it is the separate statutory elements of each offense which must be examined under this test. McWilliams, supra at 583-584. In the instant case the rule enunciated in Blockburger will not preclude two convictions because appellant was charged with two offenses, each one for possession of a different drug.

Since there is no double jeopardy violation in appellant's conviction for possession of marihuana following his acquittal for possession of amphetimine, appellant's sole ground of error is overruled and the judgment is affirmed.

/s/ Charles Price
Associate Justice

Judgment rendered, and opinion filed August 19, 1982.

Panel consists of Chief Justice J. Curtiss Brown, and Associate Justices Junell and Price.

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

CAUSE NO. 0835-82

RONALD DALE DUNN, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

212TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

Trial Court Cause Number 36,634

Appeal from the 212th District Court of Galveston County, Texas.

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 0835-32, DUNN, RONALD DALE.

Sincerely yours,

Thomas Lowe, Clerk

Dated: November 17, 1982
Austin, Texas

IN THE

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RONALD DALE DUNN

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VS.

STATE OF TEXAS

RESPONDENT

CERTIFICATE OF SERVICE

Louis Dugas, Jr., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for Ronald Dale Dunn, Petitioner in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorneys for the Respondent the Honorable Jim Maples, District Attorney, Brazoria County Courthouse, Angleton, Texas, 77515, by mail, postage prepaid, on this the _____ day of January, 1983.

_____

Louis Dugas, Jr.